In the

Supreme Court of the United States

October Term, 1979

ROSE BOORSE and YOLA BOORSE,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, KENNETH C. BOORSE, JACK SCHILS, ROLAND HOLTE, JR. and SHIRLEY HOLTE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STEVEN R. KEANE
Attorney for First Wisconsin National Bank of Milwaukee, Kenneth C. Boorse and Jack Schils

FOLEY & LARDNER
735 North Water Street
Milwaukee, Wisconsin 53202
Of Counsel

PETITION FOR PETI

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60610 (312) 565-0581

TABLE OF CONTENTS

		PAGE
I.	No Reason Exists for Granting Certiorari	1
II.	Statement of the Case	2
III.	Facts	3
IV.	Argument	5
V.	Conclusion	6

AUTHORITIES CITED

Case

Layne & Bowler Corporation v. Western Well Works, 261 U.S. 422, 43 S.Ct. 422, 66 L.Ed. 792 1

Other Authorities

12 CFR §400.735-10 to 400.735-22 5

Wis. Stats. sec. 893.19 6

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5517

HUGH ROONEY and YOLA ROONEY,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, KENNETH C. BOORSE, JACK SCHILZ, ROLAND HOLTZ, JR., and SHIRLEY HOLTZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

I.

No Reason Exists for Granting Certiorari

In *Layne & Bowler Corporation* v. *Western Well Works*, 261 U.S. 422, 43 S.Ct. 422, 66 L.Ed. 792, Mr. Chief Justice Taft, speaking for a unanimous Court, said:

> " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases in-

volving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals."

The instant case does not meet these tests for the issuance of the Writ of Certiorari—or any other tests that have been suggested in any other case to our knowledge.

II.

Statement of the Case

The petitioners, represented *pro se*, brought an action for $2,625,000 against the defendants. The purported legal basis of the action is difficult to discern.

The defendants, First Wisconsin National Bank of Milwaukee and two of its employees, Kenneth C. Boorse and Jack Schilz, moved for summary judgment on the following grounds:

1. That the court did not have subject matter jurisdiction.

2. That the complaint failed to allege a cause of action.

3. That any claims in the complaint would be barred by the doctrine of *res judicata.*

4. That any claims in the complaint would be barred by the statute of limitations.

The trial court dismissed the complaint for want of jurisdiction. The plaintiffs appealed to the Seventh Circuit Court of Appeals, which upheld the trial court.

III.

Facts

Since petitioners' brief to this court did not contain any appendix of the kind required by the rules of this court, the entire record is set forth in the appendix to this brief. Any other "facts" referred to by petitioners are *dehors* the record.

In October of 1962, the petitioners commenced a coin-operated laundry business with a collection of machines including washers, dryers, extractors, soap dispensers, etc. in Manitowoc, Wisconsin. Petitioners financed their machinery independently with a chattel mortgage obtained from the First Wisconsin National Bank of Milwaukee (Resp. A. 3).

Within a few months petitioners began falling behind on their payments to the bank on account of substantial and continuing losses. By May of 1965, after two and one-half years of operation, they were over a year behind on those payments to the bank (Resp. A. 20).

Throughout 1963 and 1964, petitioners complained bitterly of a fraud that they felt had been perpetrated on them by the people who sold them their machinery and requested the bank for advice. The bank advised them to seek a buyer. They did this but were not successful. In late 1964, they asked the bank for help (Resp. A. 20).

In response to petitioners' request, in early 1965, the bank located a prospective purchaser, Mr. Roland Holtz, of Algoma, Wisconsin. (Mr. and Mrs. Holtz are also defendants in this case.) The bank encouraged the parties to negotiate. The bank served as an intermediary after negotiations between the parties broke down. A contract between the parties was ultimately signed (Resp. A. 21).

A dispute then arose between the petitioners and the prospective purchasers involving a failure by petitioners to advise the prospective purchasers that the business was behind in its rental payments and that the landlord was threatening it with eviction from the premises. As a result of this dispute, the prospective purchasers refused to proceed. The bank thereafter foreclosed upon the plaintiffs and sold the property directly to the Holtzes (Resp. A. 21).

In September of 1967, petitioners brought a legal action in the Wisconsin Circuit Court for Milwaukee County against the Holtzes, the bank, Mr. Schilz and Mr. Boorse, who were employees of the bank, and Mr. Roger Paulsen, who was then the attorney advising the bank, making numerous charges of wrongdoing and asking for $300,000 in damages (Resp. A. 24). After trial on the merits, petitioners, who were then represented by counsel, on September 22, 1969 entered into a consent decree dismissing all of their charges (Resp. A. 50).

This action was then brought in July of 1971 in the Federal District Court for the Eastern District of Wisconsin. The charges in this action are essentially the same as those in the previous state court action.

IV.
Argument

The petitioners represent themselves. A glance at the documents before the court indicates why. No attorney in good conscience could represent them because they have no cause of action.

The first obvious defect in their alleged cause was the failure to state any claim over which the Federal Courts have subject matter jurisdiction. The complaint did not allege diversity in citizenship. (The facts alleged indicate that the petitioners and respondents are both citizens and residents of the State of Wisconsin.) It did not set forth any federal question.

The complaint did purport to allege a violation of what petitioners described as "the National Bank Act," a copy of part of which is set forth as part of the petitioners' brief (p. 21). But this "Act" is nothing more than regulations taken from 12 CFR §400.735-10 to 400.735-22, which pertain exclusively to the Export-Import Bank of the United States and really have nothing to do with any of the respondents in the case at bar.

The second defect in the complaint is that it is a rehash of a similar cause of action filed earlier by petitioners in state court which was ended by a consent decree (Resp. A. 50). The decree actually forbade petitioners from making any further charges of wrongdoing against the respondents although petitioners have obviously chosen to ignore it.

A third defect in the petitioners' complaint was that the claims in it, if any, were barred by the statute of limitations. The last act alleged in petitioners' petition occurred

in the middle of June of 1965 whereas the petition was not filed until June 29, 1971, more than six years later. Assuming, *arguendo,* that petitioners' complaint stated some cause of action e.g. for fraud, violation of express or implied contract, injury due to property not arising on contract, or wrongful taking of property, the six years statute of limitations, *Wis. Stats.* sec. 893.19 would have barred it.

The fourth defect in the plaintiffs' complaint was that it did not set forth any cause of action. Petitioners did not claim lost profits. Petitioners claim, in essence, that the bank induced them to enter into a contract with the Holtzes for the sale of their business and then, supposedly, encouraged the Holtzes not to perform the contract. The claim makes no sense. If the bank would have wanted to deprive the petitioners of their contract with the Holtzes, it never would have assisted the petitioners in obtaining that contract in the first place. In any event, the petitioners suffered no damages.

The trial court and the Seventh Circuit disposed of the matter on the jurisdictional grounds only. Their decisions were correct.

V.

Conclusion

Respondents request that the petition for writ of certiorari be dismissed.

Respectfully submitted,

STEVEN E. KEANE
Attorney for First Wisconsin National Bank of Milwaukee, Kenneth C. Boorse and Jack Schilz

FOLEY & LARDNER
Of Counsel

APPENDIX

APPENDIX

INDEX TO RESPONDENTS' APPENDIX

PAGE

Relevant Docket Entries 1

Plaintiffs' Complaint and Exhibits thereto 2

Answer of Defendants Bank, Boorse & Schilz 15

Defendants' Motion for Summary Judgment 19

Affidavit of Jacob Schilz in Support of Motion for Summary Judgment 20

Affidavit of Gilbert W. Church in Support of Motion for Summary Judgment 22

Exhibit A to Church Affidavit—Copy of a Complaint Filed by Plaintiffs in State Court in 1967 24

Exhibit B to Church Affidavit—Answer to Plaintiffs' 1967 State Court Action 40

Exhibit C to Church Affidavit—Consent Decree Entered in State Court Action 50

Affidavit of Hugh A. Rooney in Opposition to Motion for Summary Judgment 50

Affidavit of Yola Rooney in Opposition to Motion for Summary Judgment 51

Decision of the Trial Court 52

Order of United States Court of Appeals for the 7th Circuit 56

RESPONDENTS' APPENDIX

RELEVANT DOCKET ENTRIES

6/29/71	Complaint Filed
7/19/71	Answer Filed for Defendants Bank, Boorse, & Schilz
7/28/71	Motion of said Defendants for Summary Judgment
9/15/71	Decision and Order of Trial Court
6/14/72	Order of U.S. Court of Appeals for the 7th Circuit

Plaintiff's Complaint

PLAINTIFFS' COMPLAINT
(Formal Portions Omitted)

Now comes the above named plaintiffs, Hugh Rooney and Yola Rooney, his wife, by Hugh Rooney as their attorney and as and for a cause of action against the above named defendants, allege as follows:

1. That the plaintiffs, Hugh Rooney and Yola Rooney reside at Rural Route 3, Plymouth, Wisconsin, and that Hugh Rooney is a factory workman and that Yola Rooney is a housewife and office employee.

2. That the First Wisconsin National Bank is a national banking corporation organized under and by the laws of the United States and is engaged in the business of banking and has its principal office in the city of Milwaukee, Milwaukee County, Wisconsin.

3. That Kenneth C. Boorse, at the time of this action, was an officer of the First Wisconsin National Bank and resides at 5427 North 37th Street, Milwaukee, Wisconsin.

4. That Jack Schilz, also known as (aka) Jacob J. Schilz, at the time of the action herein, was an officer of the First Wisconsin National Bank and who resides at 124th Street, South 6624 Hawthorne Road, Muskego, Wisconsin.

5. That Roland L. Holtz, Jr., was a bartender at the Fox Hills Country Club, rural Mishicot, Wisconsin, and that he resided at Algoma, Wisconsin, at the time of this action, and that Shirley Holtz was his wife and also resided at Algoma, Wisconsin, at the time of this action.

6. That the plaintiffs organized and owned a business in the city of Manitowoc, Manitowoc County, Wisconsin, known as the Tower Highlander Center and were engaged in the business of coin laundry and coin dry cleaning there and did commence said business on or about October, 1962.

7. That the equipment in said store consisted of twenty (20) coin operated washing machines and eight (8) wash dryers, four (4) coin operated dry cleaning machines, money changer machine, extractor, coin operated soap dispenser, two (2) coin operated hair dryers, FM sound equipment, large hot water heater, counter scales, tables and chairs, caster equipped laundry baskets, and sundry smaller equipment; that the cost of and the installation of said equipment was approximately Fifty Thousand Dollars ($50,000) and a chattel mortgage was executed to the First Wisconsin National Bank on October 23rd, 1962, in the sum of Thirty-One Thousand Two Hundred Forty-Nine Dollars and Eighty Cents ($31,249.80) which included carrying and other charges but the planitiffs actually received only Twenty-Five Thousand Dollars ($25,000) in cash.

8. That the plaintiff Hugh Rooney and Yola Rooney further invested their own monies in the business in the sum of Twenty-Five Thousand Dollars ($25,000) up to the time they sold said business to Roland L. Holtz, Jr. and Shirley Holtz on May 11th, 1965, for Thirty Thousand Dollars ($30,000) and that on said date Jack Schilz of said bank did request the plaintiffs to sign the sale contract which had been drawn up by the bank and that he, Schilz, would go and get a Two Thousand Dollar ($2,000) check which said contract stated would be paid to the plaintiffs when they would sign said contract, and immediately after the plaintiffs had signed said contract Jack Schilz did return and tell the plaintiffs that he, Schilz, "can't find" the said Two Thousand Dollar ($2,000) check, and that said check has never been found to the best knowledge and belief of the plaintiffs; and that this unheard of lowly, scummy and deceitful conduct is prohibited by the National Bank Act aka Title 12 of the United States Code, paragraph 400.735-16.

9. That on May 28th, 1965, defendants Kenneth C. Boorse and Jack Schilz of the First Wisconsin National Bank did come to said store and place repossession stickers on all store equipment and that Jack Schilz and Kenneth C. Boorse of said bank caused all door locks at said store, interior and exterior, to be changed and that this was done without the consent of the lease holder of said building, and that on this same day these same officers of the First Wisconsin National Bank did order an employee of the plaintiffs at said store to withhold store money from the plaintiffs, money that had been taken in at said store prior to May 28th, 1965, and that on said date these said officers of the First Wisconsin National Bank did also accept a check of Two Thousand Dollars ($2,000) made out to the defendant First Wisconsin National Bank and issued to them by defendant Roland Holtz, Jr.

10. That on June 4th, 1965, the defendant First Wisconsin National Bank did send a registered mail notice to each of the plaintiffs stating that said bank would hold a second sale of this same store on June 16th, 1965, and that this was the only second sale notice of any kind the plaintiffs did receive.

11. That on June 9th, 1965, the lawyer for the defendant First Wisconsin National Bank at the time of this action, Roger Paulsen, did send the check issued May 28th, 1965, to attorney William Mooney in Plymouth Wisconsin, and that Mooney did deposit said check in his Plymouth bank; and that Mooney, who represented the plaintiffs, did accept this check in good faith for the plaintiffs; and that this check was only a ruse to get the keys to the money drawers in the store machines, keys which had been locked out of the store on May 28th, and that said defendant First Wisconsin National Bank did put a "no

recourse" endorsement on said check and that the bank's lawyer, Paulsen, did ask Mooney to have Rooney take the keys in question to the said store and that plaintiff Hugh Rooney did in fact take the keys to defendant Holtz at said store on June 9th, 1965.

12. That defendant Roland Holtz, Jr. did stop payment on June 10th, 1965, of the Two Thousand Dollar ($2,000) check issued May 28th, 1965, and that this was the same check sent to attorney William Mooney on June 9th, 1965.

13. That the defendant First Wisconsin National Bank did on June 18th, 1965, sell this same store to the same buyer a second time when defendants Roland and Shirley Holtz did buy this store a second time on June 18th, 1965, for approximately Twenty-Three Thousand Dollars ($23,000) from the defendant First Wisconsin National Bank; and that the only notice the plaintiffs received from the defendant bank did specifically state that this second sale of this same store would take place June 16th, 1965; and that the plaintiffs received no notice of their store to be held June 18th, 1965.

4. That further, Roland Holtz, Jr. and Shirley Holtz were total strangers to the plaintiffs Hugh and Yola Rooney and that they were buyers singularly discovered and promoted by the defendant First Wisconsin National Bank and the plaintiffs cooperated with defendants Roland and Shirley Holtz solely and only at the order of the defendant bank, and that the defendant First Wisconsin National Bank acted and performed the service of a realtor in this case in violation of the National Bank Act aka Title 12, Chapter LV, paragraph 400.735-17 of the United States Code.

15. That the defendant First Wisconsin National Bank did demand and did execute assignments on and did receive two insurance policies on the life of plaintiff Hugh Rooney on or about September 1st, 1962; That the defendant First Wisconsin National Bank did return these life insurance policies to the plaintiff Hugh Rooney on or about November 25th, 1968, and that the insurance forms returning said policies were signed by two officials of the defendant First Wisconsin National Bank and said forms did in capital letters state "FOR VALUE RECEIVED" and in fact said First Wisconsin National Bank did not receive any payment or value of any kind from plaintiff Hugh Rooney on or about November 25th, 1968; that in the over six years the defendant bank held said insurance policies said First Wisconsin National Bank paid nothing at all toward the upkeep or maintenance of said policies; and that the defendant bank was very insistent when they first called for said policies in 1962, that said policies must be paid up in full before being turned over to the defendant First Wisconsin National Bank. This was just one more malicious, deceitful and lawless incident in a long line of such by the defendant First Wisconsin National Bank.

16. That the aforementioned outrageous misconduct is a serious and wanton violation of the National Bank Act aka Title 12 of the United States Code, in that said Code very clearly and very specifically prohibits preferential treatment of any of the public by any National Bank employee as set forth in paragraph 400.735-15 of said Code, and that selling the plaintiffs' store twice to the same buyer at widely divergent prices is definitely preferential treatment; that the National Bank Act and said Code clearly prohibits any National Bank officer or employee

from recommending the services of any attorney as set forth in paragraph 400.735-11 of said Code, and that the First Wisconsin National Bank did tell the plaintiff that the bank's attorney would take care of everything and that the plaintiffs should not need any other lawyer, and that the plaintiffs took no part in any way in the preparation of the first sale contract; that a knowledgeable bank official advised the plaintiffs that when 'A' gives a payment check to 'B' and 'B' in turn gives said check in some settlement to 'C' and in meantime 'A' stops payment on said check, such action is illegal and that is just what happened in this case as described in paragraphs 9, 11 and 12 of this complaint. At this writing the plaintiffs are not certain that there could not be other violations in this case of the National Bank Act and said Code.

17. That the plaintiffs Hugh Rooney and Yola Rooney suffered great damage and injuries which were the direct and natural consequences of the acts of the defendants herein and which include:

(A) That the plaintiffs lost the home they had lived in for over thirty years as a result of the aforementioned misdeeds.

(B) That the plaintiffs were forced into bankruptcy by the misconduct enumerated herein.

(C) That the plaintiffs were compelled to change their residence three times within four months because of the malicious acts of the defendants.

(D) That the plaintiffs lost all equity and interest in, and monetary return from, past and future patronage from their store in Manitowoc, Wisconsin.

(E) That the plaintiffs suffered disgrace, ridicule, embarrassment, worry and frustration to the extent that their mental and emotional health was shaken; that their entire family was also adversely affected by the malicious acts of the defendants.

(F) That the plaintiffs lost sorely needed credit because of the sordid acts of the defendants.

(G) That the plaintiffs respectfully request the United States District Court for Eastern Wisconsin to grant them the right to a jury trial in this National Bank Act and Title 12 of the United States Code violation case.

(H) That the plaintiffs, with this fact well known to the defendants, are sixty years old and find it difficult to find gainful employment, and having this greatly reduced earning power, also find it discouraging to have to buy a home and submit to a thirty-year mortgage. This is a sorry situation singularly due to the dastardly misdeeds of the defendants.

(I) The plaintiffs have been advised by the Comptroller of The Currency office in Washington, D.C., that 'The National Bank Act has been codified and now appears as Title 12 of the United States Code.' Enclosed herewith are exhibits A and B which are that portion of Title 12 of the United States Code that is referred to in this complaint.

(J) That the plaintiffs, by reason of the above premises and the matters stated herein, incurred compensatory damages totaling One Hundred And Twenty-five Thousand Dollars ($125,000).

(K) That the plaintiffs further demand that there be granted to them further recovery in this matter because of the serious and malicious violations of the National Bank Act aka Title 12 Of The United States Code in the form of exemplary and punitive damages; That the plaintiffs know that the book 'Law Of Torts' copyrighted in 1955 and authored by William L. Prosser did state on page 11 of said book that 'Most

courts agree that the evidence of the defendants' wealth may be received as bearing on the question of the amount which will adequately punish him for his conduct'; that the plaintiffs also know from a news item published in the Milwaukee Sentinel issue of January 18th, 1966, which stated that the First Wisconsin National Bank did declare itself a Billion Dollar Bank (one thousand million) on or about January 18th, 1966; that the plaintiffs also know of one late case in which a banker was charged and convicted of wrongdoing, that being case number 353-967 held in October of 1969 in the Milwaukee County Court House, Milwaukee, Wisconsin, and that the judge in that case, in overruling a higher jury punitive award, assessed a punitive damage of 2½% of the defendants' declared worth.

(L) That the plaintiffs therefore demand that they be granted punitive damages of Two And One-Half Million Dollars ($2,500,000) noting, however, that this figure is only one tenth of the ratio of the punitive damages assessed in the number 353-967 case mentioned above, and therefore request that the court decide whether the ratio used in said case is applicable in this National Bank Act aka Title 12 Of The United States Code violation case as well.

18. Wherefore the plaintiffs demand minimum judgment against defendants in the sum of Two Million Six Hundred Twenty-Five Thousand Dollars ($2,625,000) together with their costs in this matter and for such other relief to be granted by the court to the plaintiff Hugh A. Rooney and Yola E. Rooney, as shall be determined just and equitable in the premises.

EXHIBIT A TO PLAINTIFFS' COMPLAINT

Photostats from Title 12, Chapter IV of Prelude of Federal Regulation

tives and no further dealings shall be had with the former employee until such determination shall be made.

§ 400.735—10 *Future employment.*

Bank regulations restrict a recipient of financial assistance from the Bank in hiring and utilizing a Bank employee. Negotiations by any Bank employee for future employment are to be fully disclosed to the Ethics Committee in those cases where the prospective employer has had more than incidental contact with the Bank or can be expected to seek the Bank's assistance in the future, and no Bank employee shall proceed with such negotiation without a determination by the Ethics Committee that he may thus proceed.

§ 400.735—11 *Recommendation of outside services.*

A Bank employee shall not indicate to anyone with whom the Bank has dealings and preference among suppliers, attorneys, engineers, or consultants as regards goods, equipment, or services to be provided in connection with any Bank assistance. It is established Bank policy to avoid placing any person or firm in a preferential position with respect to obtaining orders or contracts for materials or services. Bank employees are not to recommend the services of any attorney, enginer, economist or other consultant or adviser to any person or firm in connection with loan applications or other matters which have been or can be expected in the future to be brought before the Bank. It is recognized that borrowers, particularly foreign governments, and firms, may in good faith seek the assistance of the Bank in selecting competent firms or consultants in

connection with such matters as engineering surveys which might later form the basis for a loan application. If the interests of the Bank justify some guidance by the Bank itself in these situations, a comprehensive list of qualified firms may be furnished upon determination by the Ethics Committee of the propriety of such action.

§ 400.735—12 *Use of Government property.*

A Bank employee shall not, directly or indirectly, use, or allow the use of, Bank property of any kind, including property leased to the Bank, for other than officially approved activities. An employee has a positive duty to protect and conserve Bank property, including equipment, supplies, and other property entrusted or issued to him.

§400.735—13 *Personal financial integrity.*

A Bank employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State, or local taxes. For the purpose of this section, a "just financial obligation" means one acknowledged by the Bank employee or reduced to judgment by a court, and "in a proper and timely manner" means in a manner which the Bank determines does not, under the circumstances, reflect adversely on the Bank as his employer.

§ 400.735—14 *Gambling, betting, and lotteries.*

A Bank employee shall not participate, while on Bank-owned or leased property, or while on duty for the Bank, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket.

Exhibit B to Plaintiffs' Complaint

§ 400.735—15 *General conduct prejudicial to the Bank.*

A Bank employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Bank. A Bank employee shall avoid any action, whether or not specifically prohibited in this Subpart A, which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Bank efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Bank decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Bank.

§ 400.735—16 *Courtesy.*

A Bank employee shall conduct himself in a manner that will assure effective accomplishment of his responsibilities and must observe the requirements of courtesy, consideration, and promptness in dealing with those seeking the Bank's assistance.

EXHIBIT B TO PLAINTIFFS' COMPLAINT
(Additional Photostat of Provision in 12 CFR Chapter IV)

§ 400.735—17 *Miscellaneous statutory provisions.*

Attention of each Bank employee is directed to the following statutory provisions:

(a) The prohibition against a Bank employee participating in any manner upon the deliberation or determination of any matter affecting his personal interests or the interests of any corporation, partnership, or association in which he is directly or indirectly interested (12 U.S.C. 635a(e)).

Exhibit B to Plaintiffs' Complaint

(b) House Concurrent Resolution 175, 85th Congress, 2d Session, 72 Stat. B12, the "Code of Ethics for Government Service".

(c) Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interest.

(d) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(e) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(f) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(g) The prohibitions against the disclosure of classified information (18 U.S.C. 798; 50 U.S.C. 783).

(h) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(i) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638(c)).

(j) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(k) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(l) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(m) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(n) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(o) The prohibitions against:

(1) Embezzlement of Government money or property (18 U.S.C. 641);

(2) Failing to account for public money (18 U.S.C. 643); and

(3) Embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(p) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(q) The prohibitions against political activities in subchapter III of chapter 73 of title 5, United States Code and 18 U.S.C. 602, 603, 607, and 608.

(r) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

[31 F.R. 3048, Feb. 22, 1966, as amended at 32 F.R. 13758, Oct. 3, 1967]

SUBPART B—IMPLEMENTATION

§ 400.735—20 *Dissemination.*

The Administrative Officer will cause all Bank employees to Read Subparts A through C of this part at the time of their employment and at least annually thereafter. All Bank employees shall have read Subparts A through C of this part not later than 60 days after the effective date of issuance.

§ 400.735—21 *Ethics Committee.*

A committee on ethics (the Ethics Committee) is hereby established. It shall consist of the First Vice President, as Chairman, the Assistant General Counsel, and the Administrative Officer of the Bank. All notices to the Ethics Committee shall be given to its Chairman and only its Chairman shall speak for the Ethics Committee. The Ethics Committee is authorized and directed to take the actions referred in §§ 400.735-5(b)(1), 400.735-6(b)(4), 400.735-7(b)(1), 400.735-8(b)(4), 400.735-9(b), 400.735-10,

400.735-11, and 400.735-30(c). The Ethics Committee shall have the duty to assure that no appointment of a regular Bank employee is made if such appointment would create a conflict under § 400.735-6(b)(1) or § 400.735-7(b)(2).
[32 F.R. 13758, Oct. 3, 1967]

§ 400.735—22 *Counselor on Ethics*

The Chairman of the Ethics Committee shall serve as Counselor to the Bank and as the Bank's designee to the Civil Service Commission on matters covered by Subparts A through C of this part. He shall also coordinate the work of the Deputy Counselor on Ethics mentioned in § 400.735—23.

ANSWER OF DEFENDANTS BANK, BOORSE, AND SCHILZ
(Formal Portions Omitted)

Now come the Defendants First Wisconsin National Bank, Kenneth C. Boorse, and Jack Schilz, by their attorneys, and for their answer to Plaintiffs' complaint, admit, deny, and affirmatively allege as follows:

1. Admit the allegations in paragraph 1 of Plaintiffs' complaint.

2. With respect to the allegations in paragraph 2 of Plaintiffs' complaint, allege that the First Wisconsin National Bank has as its correct name the First Wisconsin National Bank of Milwaukee.

3. With respect to the allegations in paragraph 3 of Plaintiffs' complaint, admit that, in 1965, Kenneth C. Boorse was an officer of the First Wisconsin National Bank of Milwaukee, admit that he was and is a resident of Milwaukee, deny each and every other allegation in said paragraph.

Answer of Defendants Bank, Boorse, and Schilz

4. With respect to the allegations in paragraph 4 of Plaintiff's complaint, admit that the Defendant, Jack Schilz was and is an employee of the First Wisconsin National Bank of Milwaukee, admit that he resides on Hawthorne Road in Muskego, Wisconsin, deny each and every other allegation in said paragraph.

5. With respect to the allegations in paragraph 5 of Plaintiffs' complaint, deny knowledge or information sufficient to form a belief as to the present occupation of the Defendants, Roland L. Holtz, Jr. and Shirley Holtz.

6. Admit the allegations in paragraph 6 of Plaintiffs' complaint.

7. With respect to the allegations in paragraph 7 of Plaintiffs' complaint, deny knowledge or information sufficient to form a belief as to the total cost of the store referred to therein and affirmatively allege that the difference between the mortgage price and the amount Plaintiffs received in cash represented all interest and carrying charges throughout the term of the mortgage.

8. With respect to the allegations in paragraph 8 of Plaintiffs' complaint, admit that the Plaintiffs invested some of their own monies in said business, deny knowledge or information sufficient to form a belief as to the amount, admit that they entered into a contract to sell the business to the Defendants, Roland L. Holtz, Jr. and Shirley Holtz on or about May 11, 1965 but allege in this respect that the sale was not for cash and allege in this respect that other terms are a part of that agreement not referred to in Plaintiffs' complaint including extended payments and a contingent liability on the part of the Plaintiffs; deny each and every allegation in said paragraph.

Answer of Defendants Bank, Boorse, and Schilz

9. With respect to the allegations in paragraph 9 of Plaintiffs' complaint, admit that on or about May 28, 1965 Defendants, Kenneth Boorse and Jack Schilz, in their capacity as employees of the First Wisconsin National Bank of Milwaukee came to the store referred to and placed possession stickers on all store equipment; admit that Jack Schilz and Kenneth Boorse caused locks in said store to be changed; admit that, on this date, said employees of the First Wisconsin National Bank of Milwaukee accepted a check made out to the First Wisconsin National Bank of Milwaukee in the amount of $2,000.00 from Roland L. Holtz, Jr. and allege in this respect that the check was ultimately turned over to an attorney for Plaintiffs; deny each and every other allegation in said paragraph.

10. With respect to the allegations in paragraph 10 of Plaintiffs' complaint, admit that on or about June 4, 1965 the First Wisconsin National Bank of Milwaukee sent a notice via registered mail to the Plaintiffs stating that the First Wisconsin National Bank of Milwaukee would hold a sale of the repossessed equipment, deny each and every other allegation in said paragraph.

11. With respect to the allegations in paragraph 11 of Plaintiffs' complaint, deny that the check referred to therein was only a ruse to get the keys to the money drawers to the store machines, keys which had been locked out of the store on May 28, 1965; deny that the First Wisconsin National Bank of Milwaukee's lawyer, Paulsen, asked Mr. Mooney to have Mr. Rooney take the keys in question to the Holtzes and deny that Plaintiff, Hugh Rooney, did in fact take the keys to Defendant Holtz on June 9, 1965.

12. Admit the allegations in paragraph 12 of Plaintiffs' complaint.

13. With respect to the allegations in paragraph 13 of Plaintiffs' complaint, admit that a sale of the repossessed equipment was made by the First Wisconsin National Bank of Milwaukee to Roland and Shirley Holtz for approximately $23,000.00; admit that, as a part of this arrangement, the Plaintiff Rooney was released from any further liability; deny each and every other allegation in said paragraph.

14. Deny each and every allegation in paragraph 14 of Plaintiffs' complaint.

15. With respect to the allegations in paragraph 15 of Plaintiffs' complaint, admit that the First Wisconsin National Bank of Milwaukee did receive insurance policies on the life of Plaintiff Hugh Rooney as security; admit that the security was returned to Plaintiffs; deny any knowledge or information sufficient to form a belief as to the exact wording on communications made to Plaintiffs regarding same at the time they were returned to Plaintiffs; admit that the bank did not pay the premiums of said policies; deny each and every other allegation in said paragraph.

16. Deny each and every factual allegation in paragraph 16 of Plaintiffs' complaint.

17. Deny each and every factual allegation in paragraph 17 of Plaintiffs' complaint.

18. Deny each and every factual allegation, if any, in paragraph 18 of Plaintiffs' complaint.

19. And For Their Affirmative Defenses to any causes of action that might be stated in Plaintiffs' complaint, the Defendants, First Wisconsin National Bank of Milwaukee, Jack Schilz, and Kenneth C. Boorse, affirmatively allege:

Motion for Summary Judgment

a) The Court does not have subject matter jurisdiction over this case.

b) Plaintiffs' claims, if any, are barred by a judgment and a consent decree entered in the Circuit Court of Milwaukee County, Wisconsin, in the case of *Rooney* v. *First Wisconsin National Bank, et al.*, Case No. 350-234, which judgment effectively disposes of the issues Plaintiffs seek to raise here under the principle of *res judicata.*

c) The Plaintiffs' claims, if any, are barred by the statutes of limitation.

d) The Plaintiffs' complaint fails to set forth any claim upon which any relief can be granted.

Wherefore, said Defendants demand that Plaintiffs' complaint be dismissed on its merits together with costs and disbursements.

MOTION FOR SUMMARY JUDGMENT
(Formal Parts Omitted)

The Defendants, First Wisconsin National Bank of Milwaukee, Kenneth C. Boorse and Jack Schilz, by their attorneys, Gilbert W. Church and James P. Brody, hereby move the court for an order granting said Defendants a motion for summary judgment in accordance with *Fed. R.Civ. P.* 56 on the following grounds:

1. The court does not have subject matter jurisdiction of the case.

2. The complaint fails to state any claim upon which relief can be granted.

3 The plaintiffs' claims, if any, are barred by the doctrine of *res judicata.*

4. The Plaintiffs' claims, if any, are barred by the statute of limitations.

The facts in support of the Defendants' motion for summary judgment are contained in the Plaintiffs' complaint and in the affidavits attached hereto.

AFFIDAVIT OF JACOB J. SCHILZ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
(Formal Portions Omitted)

Jacob J. Schilz, being first duly sworn, on oath deposes and says:

1. He is an employee of the First Wisconsin National Bank of Milwaukee (hereinafter referred to as the Bank), the Defendant denominated Jack Schilz by Plaintiffs' complaint, and makes this affidavit on the basis of his own personal knowledge and statements made to him by Plaintiffs.

2. Within a few months after the Plaintiffs opened the laundry business involved in this case, they began falling behind on the payments owed to the Bank under the chattel mortgage note which Plaintiffs had given the Bank in connection with the financing of their laundry equipment. They furnished the Bank with accounting statements indicating their business was sustaining substantial and continuing losses. They asked for and received permission to make partial payments but they stopped making even partial payments. In May of 1965, Plaintiffs were more than a year behind on their monthly obligations to the Bank.

3. Throughout 1963 and 1964, the Plaintiff, Hugh Rooney, complained bitterly to the Bank of a "fraud" that he felt had been perpetrated upon him by the sellers of the laundry machinery and requested the Bank for advice. He was advised to seek a buyer. In 1963 and 1964, Mr. Rooney reported that he had tried to find a buyer for his business but had been unsuccessful. In late 1964 he asked the Bank for help in locating a buyer.

Affidavit of Jacob J. Schilz

4. In response to Plaintiffs' request, in early 1965, the Bank located a prospective purchaser, Mr. Roland Holtz of Algoma, Wisconsin, who seemed to the Bank to be a good prospect on account of some prior experience in the laundry business and the fact that he lived closer to it than Mr. Rooney did. The Bank initially referred Mr. Holtz to Mr. Rooney and the two individuals met and negotiated between themselves. The negotiations between Mr. Rooney and Mr. Holtz ceased when Mr. Rooney and Mr. Holtz could not agree on terms and when Mr. Rooney then asked the Bank to obtain the best offer they could from Mr. Holtz. The Bank did this and sent the offer to Mr. Rooney.

5. A contract between Plaintiffs and Mr. Holtz was signed. A dispute then arose between Mr. Holtz and Mr. Rooney involving, among other things, a failure by Mr. Rooney to advise Mr. Holtz that the business being sold was behind in its rent to the landlord and that the landlord was threatening to evict it from the premises, and an entry into the premises by Mr. Rooney at which some equipment was removed. As a result of this dispute, Mr. Holtz allegedly on the advice of his attorney, Mr. Jacob Muchin of Manitowoc, refused to proceed further on his contract with Mr. Rooney, the Bank foreclosed and, after due notice, sold the property to Mr. Holtz directly, made payments to the landlord to secure the lease, and released Mr. Rooney from further liability.

6. The events described above were all consummated prior to June 29, 1965.

Affidavit of Gilbert W. Church

AFFIDAVIT OF GILBERT W. CHURCH IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Formal portions omitted)

Gilbert W. Church, being first duly sworn, on oath deposes and says:

1. He is an attorney, a member of the law firm of Foley & Lardner, and one of the attorneys for the Defendants, First Wisconsin National Bank of Milwaukee, Kenneth C. Boorse, and Jack Schilz in the above matter.

2. He also represented the foregoing Defendants in the legal action brought by Hugh A. Rooney and Yola Rooney in the Circuit Court of Milwaukee County, Wisconsin, entitled *Hugh A. Rooney and Yola Rooney* vs. *First Wisconsin National Bank, Kenneth C. Boorse, Jack Schilz, Roland L. Holtz, Jr., and Shirley Holtz, and Roger P. Paulsen,* Case No. 350-234. A true copy of the complaint in that action, as finally amended, is attached hereto as Exhibit A. A true copy of the answer filed by the Defendants, First Wisconsin National Bank, Kenneth C. Boorse, and Jack Schilz, is attached hereto as Exhibit B.

3. In the foregoing action, the Plaintiffs, Hugh A. Rooney and Yola Rooney, were represented by Attorney David Rabinovitz. The case was completely tried before a jury.

4. At the conclusion of the trial, the Judge dismissed the Plaintiffs' complaint against Attorney Paulsen (on whose advice the First Wisconsin National Bank of Milwaukee had relied) as a matter of law. The Judge said he would defer ruling on the Bank's motion for directed verdict until after the jury's verdict. He then recommended to the remaining parties that they settle the case,

and he urged the First Wisconsin National Bank of Milwaukee to offer the Plaintiffs something in settlement, so that there could be an amicable disposition of the suit. In response to the Court's request, the Bank made such an offer, conditioned on a judgment dismissing the case on the merits, and on the Rooney's agreeing to utter no further charges of wrongdoing against the First Wisconsin National Bank of Milwaukee regarding the matters involved in the litigation. (The latter was requested because of some statements which had previously been made.) The deficiencies in their case and the terms of the proposed settlement were explained to Plaintiffs by their own attorney, Mr. Rabinovitz, and by the Court. The Plaintiffs were given the night to "sleep on" the proposed settlement. The settlement was finally consummated in open Court on the following day with Plaintiffs and their attorneys agreeing to its terms.

5. Judgment in accordance with the stipulation dismissing all of the Plaintiffs' claims against all of the Defendants and enjoining Plaintiffs from making any further charges against the First Wisconsin National Bank of Milwaukee of wrongdoing was entered by the Court on September 22, 1969. A copy of that judgment it attached hereto as Exhibit C. At the request of Mr. Rabinovitz and with the approval of Plaintiffs, the agreed upon settlement was paid to Mr. Rabinovitz.

6. Your affiant believes the Plaintiffs' cause of action has no merit.

Exhibit "A" to Church Affidavit

ROONEY'S AMENDED COMPLAINT IN THEIR 1967 STATE COURT ACTION AGAINST THE SAME DEFENDANTS AND ATTORNEY ROGER PAULSEN.

(Formal portions omitted.)

Now comes the above named plaintiffs, Hugh A. Rooney and Yola Rooney, by David Rabinovitz, their attorney and as and for a cause of action against the above named defendants, allege as follows:

1. That the plaintiffs, Hugh A. Rooney and Yola Rooney reside at Route #1, Plymouth, Wisconsin, and that Hugh A. Rooney is a factory gate tender and that Yola Rooney his wife, is a housewife and also an office employee.

2. That the First Wisconsin National Bank is a National Banking Corporation organized under and by the laws of the United States and is engaged in the business of banking and has its principal office and place of business in the City of Milwaukee, Milwaukee County, Wisconsin.

3. That Kenneth C. Boorse, at the time of the action herein, was the Assistant Vice-President of the First Wisconsin National Bank, and is now retired and resides at 3427 North 37th Street, Milwaukee, Wisconsin.

4. That Jack Schilz, at the time of the action herein, was the manager of the Collection Department of the First Wisconsin National Bank and the plaintiffs are informed and verily believe that the said defendant, Jack Schilz, is now Vice-President of said First Wisconsin National Bank.

5. That Roger P. Paulsen, is an attorney duly licensed by the State of Wisconsin and is associated with the law firm of Brady, Tyrrell, Cotter & Cutler with offices at 735 North Water Street, City of Milwaukee, Milwaukee County, Wisconsin, and was, at the time of the action herein, and is at the present time, attorney for the First Wisconsin National Bank of Milwaukee.

Exhibit "A" to Church Affidavit

6. That the plaintiffs organized and owned a business in the City of Manitowoc, Manitowoc County, Wisconsin known as the Tower Highlander Center being engaged in the business of a coin laundry and coin dry-cleaning and did commence operating said business on or about October, 1962.

7. That the equipment in said laundry consisted of twenty (20) coin operated washing machines and four (4) coin operated dry cleaning machines; that the cost of said equipment was approximately Fifty Thousand ($50,000) Dollars and that the plaintiffs invested in said laundry Twenty-five Thousand ($25,000) Dollars and executed a chattel mortgage to the First Wisconsin National Bank on October 23, 1962 in the sum of Thirty-one Thousand Two Hundred Forty-nine Dollars and Eighty Cents ($31,249.80) which included carrying charges and other charges which the Bank uses in these loans but the plaintiffs actually received Twenty-five Thousand ($25,000) Dollars in cash.

8. That the plaintiffs, Hugh A. Rooney and Yola Rooney, further invested their own funds in the business in the sum of Twenty-five Thousand ($25,000) Dollars up to the time that they sold said business to the defendants, Ronald L. Holtz and Shirley Holtz, on May 11, 1965.

9. That approximately a year prior to May 11, 1965, the plaintiffs advised Kenneth C. Boorse, one of the defendants, that he was interested in disposing of said business and that on March 30, 1965, said Kenneth C. Boorse, Defendant, advised plaintiffs by telephone that he had a buyer whose name was Roland L. Holtz and also advised the plaintiffs that the selling price would be Thirty Thousand ($30,000) Dollars and that under the terms the plain-

tiffs would receive immediately Two Thousand ($2,000) Dollars at the signing of the contract and Two Hundred ($200) Dollars a month, plus interest over and above the amount due to the Bank until the note and chattel mortgage was paid; that said Kenneth C. Boorse, defendant, further advised plaintiffs in said conversation, that the Bank's attorney, Roger P. Paulsen, defendant, would draw the agreement for all the parties concerned, namely, the First Wisconsin National Bank, Hugh A. Rooney and Yola Rooney, his wife, Roland L. Holtz and Shirley Holtz, his wife, and said Kenneth C. Boorse further stated to the plaintiffs that the bank would handle the entire matter and there was no need to consult a lawyer of their own nor make any contacts with the purchaser, Roland L. Holtz, whatsoever and that the defendant, the First Wisconsin National Bank, would take care of the entire legal matter and said Jack Schilz, defendant, did request Roger P. Paulsen, defendant, to draft an agreement for the sale of said premises by the plaintiffs to Roland L. Holtz and Shirley Holtz, his wife, and said Kenneth C. Boorse, defendant, further advised plaintiffs that their interests would be fully protected by the attorneys for the Bank in drafting of said agreement; that said Roger P. Paulsen, defendant, and attorney for the First Wisconsin National Bank, did at no time speak to nor interview the plaintiffs in any way whatsoever nor did he consult with them as to the contents of said agreement and further that the plaintiffs were never advised by any officials of the Bank or Roger P. Paulsen, defendant, as to the contents of said agreement to be drafted for the sale of said business to the defendant, Roland L. Holtz and Shirley Holtz, his wife.

Exhibit "A" to Church Affidavit

10. That said defendant, Roger P. Paulsen, on May 11, 1965 and prior thereto was familiar with and did advise the First Wisconsin National Bank and the defendants, Kenneth C. Boorse and Jack Schilz, throughout the entire negotiations culminating in the agreement of May 11, 1965 and said Roger P. Paulsen was fully aware of and acquainted with the background and facts surrounding and concerning said agreement of May 11, 1965; that there was at no time any personal relationship between the plaintiffs and said defendant, Roger P. Paulsen; that by reason of the fact that the said defendant, Kenneth C. Boorse, did advise the plaintiffs that they would be fully protected as to their rights by said Roger P. Paulsen, defendant, in the drafting of said agreement of May 11, 1965, it became the responsibility of said defendant, Roger P. Paulsen to protect the interests of the plaintiffs.

11. That on May 11, 1965 plaintiffs did sign said agreement and that defendants, Roland L. Holtz and Shirley Holtz, had previously signed the agreement and that on the same day the plaintiffs signed the agreement, Jack Schilz defendant, in behalf of the First Wisconsin National Bank did also sign said agreement.

12. That said agreement, among other things recited the fact that the plaintiffs were indebted to the Bank in the sum of Twenty-one Thousand Four Hundred Thirty-two ($21,432.00) Dollars by virtue of a note and chattel mortgage dated October 23, 1962 and provided further as follows:

> "WHEREAS, the Rooneys are in default in the payment of the said obligation to the bank, and
>
> "WHEREAS, the Holtzes desire to purchase the property described in the said chattel mortgage, and

Exhibit "A" to Church Affidavit

"WHEREAS, the Bank is willing to forebear, for the present, the enforcement of the debt due from the Rooneys,

"NOW, THEREFORE, in consideration of these presents, it is mutually agreed between the parties as follows:"

That the plaintiffs did rely upon said paragraph that the Bank is willing to forebear for the present the enforcement of the debt due from the Rooneys and together with the promise made by the defendant, Kenneth C. Boorse, that said agreement would fully protect the plaintiffs' interests in their relationship with the Bank and did believe that said statement of forebearance constituted a promise by the Bank not to foreclose the note and chattel mortgage under said agreement of May 11, 1965 and as long as said agreement was abided by and in force and effect; that said clause was so worded as to make it appear to the average layman that said note and chattel mortgage would not be foreclosed and the plaintiffs relied upon said clause and representation and did sign said agreement in reliance thereon.

13. That said agreement further provided that the sum of Two Thousand ($2,000) Dollars would be paid to the plaintiffs by the defendants, Roland L. Holtz and Shirley Holtz, directly to the Bank and that the first thirty-two (32) of such installment payments would be in the sum of Six Hundred Twenty-eight Dollars and Sixty-four Cents (628.64) and the thirty-third (33rd) installment would be in the sum of Five Hundred Ninety-Six Dollars and Sixty-four Cents ($596.64) and that the Bank

would retain Four Hundred Twenty-eight Dollars and Sixty-four Cents ($428.64) per month and that the amount received by the Bank in excess of Four Hundred Twenty-eight Dollars and Sixty-four Cents ($428.64) would be paid to the plaintiffs and amounts to Two Hundred ($200) Dollars per month for thirty-two (32) installments and One Hundred Sixty-eight Dollars and Sixty-four Cents ($168.64) on the thirty-third (33rd) installment and that at that time the plaintiffs' indebtedness to the Bank would be paid and complete; that said clause of forebearance, as quoted herein before, was conceived and drafted by said defendant, Roger P. Paulsen, attorney for the defendant, First Wisconsin National Bank, and in concurrence with the defendant, Jack Schilz, and as the agent of the Bank was fraudulent and constituted a misrepresentation deliberately inserted in the agreement for the purpose of disarming and lulling the plaintiffs into believing that by signing this agreement, with this particular clause, they were secure in that not only would their business be sold but that their indebtedness would be paid to the Bank and in addition would receive the monies as aforesaid; that said clause was so worded as to make it appear that the note and chattel mortgage would not be foreclosed and would eventually be paid; that the defendants, Jack Schilz and Roger P. Paulsen, did well know that the said forebearance clause was deliberately inserted for the prime and only purpose of misleading the plaintiffs and constituted a misrepresentation in that it influenced the plaintiffs, because of their fiduciary relationship with the Bank, to sign said agreement; that said forebearance clause together with the other portions of said agreement provid-

ing for alleged benefits to the plaintiffs constituted a prelude to the conspiracy hereinafter alleged and engaged in by the defendants; that the plaintiffs, because of said statements in said contract, were deprived of the honest advice they assumed they were getting from the Bank and its attorney, Roger P. Paulsen, defendant, and that the said misrepresentations in said agreement constituted a subtle and reprehensible kind of fraud particularly since the plaintiffs reposed confidence in the Bank, Roger P. Paulsen, Kenneth C. Boorse and Jack Schilz and that said defendants possessed superiority and influence on said plaintiffs by reason of their reputation as the largest financial institution in the State of Wisconsin and in Roger P. Paulsen as a member of one of the largest law firms in the City of Milwaukee, Wisconsin.

14. That the defendant, Roger P. Paulsen, had a duty under the Canon of Ethics of the American Bar Association, in his capacity as attorney for the Bank not to take advantage of said plaintiffs by the insertion of the forebearance clause in said agreement; that by such act he did represent the Bank and acted contrary to his responsibility to the plaintiffs inasmuch as it was his duty to draft an agreement that was fair and equitable to all the parties concerned; that the defendant Bank and Roger P. Paulsen, defendant, by the very wording of said clause never intended to abide by the spirit of fair justice and equal and fair treatment to all the parties concerned, particularly to the plaintiffs; that the intention not to abide by said clause and carry it out on the part of the defendants did exist at the time the contract was drafted and executed as was demonstrated subsequently, when said note and chattel mortgage was foreclosed prior to the

date said agreement was to take effect; that by the very fact that there was no intention to comply with said agreement the defendants clearly committed a misrepresentation of a material fact; that said intention not to comply with said agreement was not disclosed to the plaintiffs and said nondisclosure induced the action on the part of the plaintiffs to sell their business and sign said agreement.

15. That said defendant, Roger P. Paulsen, in the drafting of said agreement of May 11, 1965 showed no responsibility to the plaintiffs and confined his responsibility to the Bank, protecting their interests only, in violation of Canon 49 and Canon 6 of the American Bar Association in that he represented conflicting interests without the consent of all concerned and without having given a full disclosure of the facts to the plaintiffs in any way whatsoever and in fact having disclosed no facts or terms to the plaintiffs as to the contents of the agreement; that said defendant, Roger P. Paulsen, is now endeavoring in behalf of the Bank to uphold and enforce said agreement when he led the plaintiffs to believe, to their detriment, that the terms of the agreement were for their protection and fair to them; that it became the duty for the defendant, Roger P. Paulsen, in a situation of this kind of conflicting interests, to have declined to represent any of the parties and did not have the legal nor moral right to represent all of them.

16. That at the time said agreement was signed on May 11, 1965 the sum of Two Thousand ($2,000) Dollars which was to be paid directly to the plaintiffs was not paid by reason of the fact the Jack Schilz, defendant, was unable to locate the alleged check of Two Thousand ($2,000) Dollars and same could not be found at the Bank; that consequently the plaintiffs did not receive the Two Thousand

($2,000) Dollars at the time of the signing of the agreement; that the plaintiffs did rely upon the receiving of said check for Two Thousand ($2,000) Dollars when they signed the agreement when in truth and in fact the said Bank and its officers misrepresented that said check for Two Thousand ($2,000) Dollars was in existence and would be paid to the plaintiff on May 11, 1965; that the plaintiffs relied on said representation which was a very material part of the transaction; that on May 28, 1965 the defendants, Kenneth C. Boorse and Jack Schilz, in their own capacity and as agents for the First Wisconsin National Bank, did by a ruse contact the plaintiffs requesting that they meet them at the plaintiffs' place of business in Manitowoc, Wisconsin, on the pretense stated by them of making a social visit; that when the defendants, Kenneth C. Boorse and Jack Schilz arrived at the place of business of the plaintiffs they did immediately commence to tag the equipment for the purpose of commencing the necessary steps in the foreclosure of said note and chattel mortgage herein which constituted a repossession of said equipment under the note and chattel mortgage with the right to allow the equipment to remain on the premises; that subsequently a notice was mailed to the plaintiffs on June 4, 1965, scheduling a private sale of said equipment on June 16, 1965, at 9:00 A.M. at the First Wisconsin National Bank.

17. That on said day, namely May 28, 1965, the defendants, Kenneth C. Boorse and Jack Schilz, said date being prior to the date that the agreement of May 11, 1965 was to take effect, did cause the locks on the doors of the plaintiffs' laundry premises changed and the defendant Roland L. Holtz did, on the same day and con-

tinually from that day, assume active charge of the business to the exclusion of the plaintiffs; that said defendants, Kenneth C. Boorse and Jack Schilz, did not obtain permission from the plaintiffs to change the locks on the doors leading to the premises and did do so outside of the presence of the plaintiffs, without their knowledge or consent.

18. That the foreclosing of said chattel mortgage was deliberately contrived by the defendants and that the defendants did conspire together to commit an unlawful action, namely the foreclosure of this chattel mortgage when the agreement of May 11, 1965, was in no way breached, defaulted or violated in any manner whatsoever; that the defendant, Roland L. Holtz, was not to be given the right to possession of said premises under said agreement prior to June 1, 1965; that the defendants, Kenneth C. Boorse and Jack Schilz, have admitted that no part of said agreement had been breached on May 28, 1965, and that the plaintiffs, as has been alleged hereinbefore, were promised and led to believe by the terms of said agreement that no such foreclosure would take place and that nothing occurred between May 11, 1965 and May 28, 1965 to give cause to the First Wisconsin National Bank to foreclose said note and chattel mortgage; that if any breach did occur, it was by defendants, Roland L. Holtz and Shirley Holtz, in their failure to pay the Two Thousand ($2,000) Dollars to the plaintiffs and the Two Hundred ($200) Dollars on June 1, 1965;

19. That on the 16th day of June, 1965 at 9:00 A.M. at the First Wisconsin National Bank, 743 N. Water Street, Milwaukee, Wisconsin, the said defendants, Roland L. Holtz and Shirley Holtz, his wife, purchased the personal

property under said chattel mortgage which was foreclosed by the Bank for the sum of Twenty-one Thousand Four Hundred Thirty-two ($21,432.00) Dollars; that on the 18th day of June, 1965 the Bank did execute a bill of sale to the defendants, Roland L. Holtz and Shirley Holtz, for the sum of Twenty-one Thousand Four Hundred Thirty-two ($21,432.00) Dollars conveying all of the personal property owned by the plaintiffs and subsequently mortgaged to the Bank.

20. That on June 9, 1965 the defendant, Roger P. Paulsen, did send a letter to Attorney William Mooney of Plymouth, Wisconsin, then the attorney for the plaintiffs, in which he enclosed the check of Roland L. Holtz, defendant, dated May 28, 1965 payable to the order of the First Wisconsin National Bank in the sum of Two Thousand ($2,000) Dollars and endorsed by the Bank to William Mooney; stating further in said letter that with the proceeds of this check said William Mooney would obtain the plaintiffs' release from the outstanding lease so that the landlord could execute a lease with the defendants, Roland L. Holtz and Shirley Holtz; that prior to the day that the Defendant, Roger P. Paulsen, sent said check to Attorney William Mooney the defendants, Kenneth C. Boorse and Jack Schilz, did advise Roland L. Holtz that the check of May 28, 1965 was being forwarded to attorney William Mooney and the defendant, Roland L. Holtz, has admitted that the purpose of so being advised by Kenneth C. Boorse and Jack Schilz, defendants, was to know when said check would arrive in the office of Attorney William Mooney; that said defendant, Roland L. Holtz, had made demand upon the plaintiffs for the keys used in opening and closing the money boxes of the laundry machines and that as soon as the check was received by Attorney William

Mooney the plaintiffs did turn over said keys to the defendant, Roland L. Holtz; that after Roland L. Holtz received the keys he did immediately stop payment of said check of Two Thousand ($2,000) Dollars and did admit that the sole purpose of the Bank in conspiring with him, Jack Schilz, Kenneth C. Boorse and Roger P. Paulsen in sending said check and subsequently stopping payment on same was for the sole purpose of obtaining said keys for the money boxes and not for the purpose of having the plaintiffs actually receive and realize any benefits of the said check for Two Thousand ($2,000) Dollars; that contrary to the request by defendant, Roger P. Paulsen, in said letter of June 9, 1965 to Attorney William Mooney, that the Two Thousand ($2,000) Dollars be used to pay the landlord and make it possible to execute the lease for defendant, Roland L. Holtz; said Roland L. Holtz made it impossible for the plaintiffs to pay the landlord by stopping payment on said check of Two Thousand ($2,000) Dollars; all of said defendants conspired in said action for the purpose of benefiting said defendant, Roland L. Holtz, so that he could, first of all, purchase said business at the foreclosure sale for the sum of Eight Thousand Five Hundred Sixty-eight ($8,568.00) Dollars less than the sum he agreed to purchase same in the agreement of May 11, 1965, and said defendants did further conspire unlawfully and illegally to make it impossible for the plaintiffs to receive the benefits of said agreement of May 11, 1965 by prematurely and without cause or reason, foreclose said chattel mortgage and did further hinder and prevent the plaintiffs from receiving the benefits under the agreement of May 11, 1965 by conspiring to stop payment of said check for Two Thousand ($2,000) Dollars; that the truth and the fact is that the defendant, Roland L. Holtz,

was the only party in default in not having paid said Two Thousand ($2,000) Dollars on or before June 1, 1965 and instead became the owner of the equipment under the foreclosure sale on June 16, 1965 at a saving of Eight Thousand Five Hundred Sixty-eight ($8,568.00) Dollars. That contrary to the letter sent by defendant, Roger P. Paulsen, on June 9, 1965 in regard to the lease and compliance with the Bulk Sales Act there was nothing whatsoever mentioned in said agreement of May 11, 1965 concerning these two matters; that in said letter defendant, Roger P. Paulsen, did deliberately misrepresent the agreement of the plaintiffs and did so by reason of the fact that he was interested in representing the interests of the Bank only when at the same time he was to represent the interests of the plaintiffs and instead misled and deceived them by the language in said agreement.

21. That the defendant, Roger P. Paulsen, in said letter of June 9, 1965 addressed to Attorney William Mooney did render legal advice to Attorney Mooney for the benefit of the plaintiffs with reference to matters that he well knew were not contained in the agreement of May 11, 1965 and that as an experienced and well informed attorney he well knew that the obligation of the plaintiffs was to only comply with the agreement and that any matters outside of the agreement were irrelevant, not being contained in said agreement.

22. That said defendant, Roland L. Holtz, as hereinbefore stated, took possession of said premises not only prior to the date as provided for in said agreement but before he allegedly purchased said equipment at the foreclosure sale on June 16, 1965; that the plaintiffs allege that all of said circumstances and facts herein alleged were

initially arranged by a scheme and conspiracy from the first time said defendant, Kenneth C. Boorse met said defendant, Roland L. Holtz, at a tavern, where said Roland L. Holtz was a bartender, and conveyed to the plaintiffs the terms and conditions of the future agreement of May 11, 1965 and that upon meeting the defendant, Roland L. Holtz, for the first time the defendant, Kenneth C. Boorse and the other defendants contrived and schemed to obtain the business of the plaintiffs through an illegal and "phony" foreclosure of the chattel mortgage for the purpose of foreclosing plaintiffs and depriving them of their business and secondly for the purpose of providing a method by which said defendant, Roland L. Holtz, could purchase said business for Twenty-one Thousand Four Hundred Thirty-two ($21,432.00) Dollars instead of Thirty Thousand ($30,000) Dollars.

23. That the defendants, Roland L. Holtz and Shirley Holtz, were in default on June 1, 1965 in having failed to pay said Two Thousand ($2,000) Dollars and the first installment payment under the contract and that nothing was done by defendant, Roger P. Paulsen, attorney for the Bank nor any of the officials of the Bank in enforcing said contract as against defendants, Roland L. Holtz and Shirley Holtz, his wife; however, as to the plaintiffs who were the innocent parties in this matter and on the admission of the defendant, Jack Schilz, had not breached any part of the contract of May 11, 1965, the defendants did conspire, fraudulently and illegally in depriving the plaintiffs of their business; that the defendants herein made false representations as to the agreement of May 11, 1965 as to the forebearance of foreclosure of the chattel mortgage; that they did foreclose the chattel mortgage without any

legal basis or reason; that the defendants did, together conspire and misrepresent to the plaintiffs that the Two Thousand ($2,000) Dollars was being sent by the defendants to plaintiff's lawyer, William G. Mooney, so that he could pay the landlord and that instead the defendants conspired to obtain the keys to the coin boxes and thereafter, together, conspired to stop payment on said check making it impossible for the plaintiffs to use any part of said money to pay the landlord.

24. That the plaintiffs relied upon these misrepresentations made by the defendants and that these misrepresentations were material and the plaintiffs did believe them to be true and particularly did believe the agents of the Bank because of their fiduciary relationship with said Bank and further did particularly believe Roger P. Paulsen, defendant, that the agreement of May 11, 1965 drafted by Roger P. Paulsen, was fair and would protect the plaintiffs. That all of said acts of misrepresentations, relied upon by the plaintiffs and all of said misrepresentations being made did cause the plaintiffs to part with their business in the signing of said agreement resulting in damage to the plaintiffs as follows:

(a) That the plaintiffs suffered damages and injuries which were the direct and natural consequences of the acts of the defendants of said fraud committed by them as hereinbefore alleged consisting of the loss of their financial interest in the coin laundry and dry cleaning business at Manitowoc, Wisconsin.

(b) That the plaintiffs lost, through said fraud, all such profits that could be arrived at with reasonable certainty in the future.

Exhibit "A" to Church Affidavit

(c) That the plaintiffs lost the cost of the expenses incurred in creating the good will in advertising the Tower Highlander Center, being said laundry business.

(d) That the plaintiffs lost their investment and costs of the equipment in said business.

(e) That the plaintiffs expended moneys for the litigation of this matter including attorney fees through their loss.

(f) That the plaintiffs suffered trouble, vexation and annoyance caused by the fraud committed by these defendants.

(g) That the plaintiffs were deprived of the interest on the investment of said business from the date they were deprived of same by the defendants.

(h) That the plaintiffs, by reason of the above premises and the matters stated therein, incurred compensatory damages totaling the sum of One Hundred Thousand ($100,000.00) Dollars.

(i) That the plaintiffs further demand that there be granted to them further recovery in this matter because of the massive and extreme fraud committed against them by the defendants as and for punitive and exemplary damages against the defendants the sum of Two Hundred Thousand ($200,000.00) Dollars.

WHEREFORE the plaintiffs demand judgment against the defendants in the sum of Three Hundred Thousand ($300,000.00) Dollars together with their costs in this matter and for such other relief to be granted by the Court to the plaintiffs, Hugh A. Rooney and Yola Rooney, as shall be determined just and equitable in the premises.

Exhibit "B" to Church Affidavit

ANSWER OF BANK & BANK EMPLOYEES TO ROONEYS' 1967 STATE COURT ACTION

[Formal Portions and Exhibit Omitted]

Now come First Wisconsin National Bank of Milwaukee (incorrectly referred to in plaintiffs' complaint as "First Wisconsin National Bank"), Kenneth C. Boorse, and Jack Schilz, three of the defendants above named, by their attorneys, Foley, Sammond & Lardner, and for their answer to the amended complaint of the plaintiffs herein, deny, admit and allege as follows:

1. With respect to the allegations contained in paragraph 1, deny having any knowledge or information sufficient to form a belief as to the present occupation or place of residence of either of the plaintiffs.

2. With respect to the allegations contained in paragraph 2, allege that the correct name of the defendant bank is First Wisconsin National Bank of Milwaukee, and that it is a national banking association.

3. Admit the allegations contained in paragraph 3.

4. With respect to the allegations contained in paragraph 4, allege that Jack Schilz was at the time of the events alleged the manager of the Adjustment Department of said Bank; deny that he is now vice president of said Bank.

5. With respect to paragraph 5, deny that Roger P. Paulsen was or is "attorney" for said Bank, admitting in this respect that he does now, and did during the period herein alleged, perform various legal services for the Bank, from time to time, as a lawyer.

6. Admit the allegations contained in paragraph 6.

7. With respect to the allegations contained in paragraph 7, deny upon information and belief that the cost of said equipment itself was approximately $50,000.00,

alleging in this respect upon information and belief that the cost was approximately $37,000.00 but admitting, upon information and belief, that additional costs in amounts unknown to defendants were incurred in installation; deny having any knowledge or information sufficient to form a belief as to the amount actually invested by plaintiffs.

8. Deny having any knowledge or information sufficient to form a belief as to the amount, if any, of their own funds invested by plaintiffs in said business.

9. Deny each and every allegation contained in paragraph 9, except admit and allege in these respects as follows: admit that approximately one year prior to May 11, 1965, and earlier, the plaintiffs advised Kenneth C. Boorse that plaintiffs were interested in disposing of said business; admit that prior to March 30, 1965, Kenneth C. Boorse advised plaintiffs that he had met a prospective buyer of the business, named Roland L. Holtz; allege that the selling price of $30,000.00 was set by plaintiffs; allege that on or about March 30, 1965, following discussions between plaintiff Hugh A. Rooney and Mr. Holtz, the latter advised said Bank that he would offer $30,000.00 for said business, with a $1,000.00 down payment, later changed to a $2,000.00 down payment, and that offer was thereafter communicated by Mr. Schilz to the plaintiffs; Mr. Schilz at or about said time also advised plaintiffs how, under the proposed contract, the purchasers would make installment payments to the Bank to be applied against the monthly installments due from plaintiffs to the Bank, and for a time, additional payments which the Bank would pay over to plaintiffs, the exact terms thereof being as set forth in the agreement subsequently executed as of May 11, 1965, a true copy being attached hereto as Exhibit A and being incorporated herein by reference in its entirety; allege that sometime

after April 2, 1965, Mr. Boorse advised plaintiffs that Mr. Paulsen, the lawyer acting for the Bank, would draft the agreement, but, without limiting the foregoing more general denials, specifically deny that any of these defendants said that plaintiffs should not consult any lawyer of their own, or that Mr. Paulsen would act as their attorney, or that they should not make any contacts with the purchaser, alleging further in this respect upon information and belief that plaintiffs did make contacts with the purchaser, and that plaintiff Hugh A. Rooney advised the Bank and these defendants that he would contact his own attorney before signing the contract; admit that Jack Schilz did request Roger P. Paulsen to draft an agreement; allege that these defendants discussed contents of said agreement with plaintiffs prior to and after it was drafted, and prior to their signing it; admit upon information and belief that Mr. Paulsen did not communicate with them prior to the date of signing except to write them, expressly as attorney for the Bank, concerning the signing.

10. With respect to the allegations contained in paragraph 10, deny each and every allegation, except allege and admit as follows: admit that Roger P. Paulsen gave legal counsel to the said Bank during and after April, 1965, concerning the sale, that he had some knowledge of prior transactions between plaintiffs and the Bank, and that he was told the terms which had been agreed upon for the sale so that he could draw the necessary agreement; admit that Kenneth C. Boorse told plaintiffs that the Bank would assist by having its attorney draft the agreement, but deny that he stated that plaintiffs "would be fully protected as to their rights;" allege that plaintiffs' interests or rights were not violated by said Bank, its attorney, agents or employees; deny the plaintiffs' legal conclusion

that it became the responsibility of Roger P. Paulsen to protect any such interests or rights; admit that there was no relationship between Roger Paulsen and plaintiffs.

11. Admit the allegations contained in paragraph 11.

12. With respect to the allegations contained in paragraph 12, these defendants incorporate herein by reference the agreement attached hereto as Exhibit A, it being the best evidence of the agreement herein involved; deny that Mr. Boorse made the promise alleged; deny having any knowledge or information sufficient to form a belief as to whether plaintiffs relied upon the paragraph alleged, or anything else, or as to what they believed; deny that the clause was worded as alleged; deny having any knowledge or information sufficient to form a belief that plaintiffs relied upon said clause or any representations or that they signed any agreement in reliance thereon.

13. With respect to paragraph 13, deny that it correctly or fully sets forth the terms of the agreement, alleging in this respect that the said terms are fully and correctly set forth in Exhibit A attached hereto and incorporated herein by reference; deny having any knowledge or information sufficient to form a belief as to whether the clause of forebearance was conceived by Roger P. Paulsen, admitting in this respect, upon information and belief, that it was drafted by him or at his direction; deny that the drafting occurred in concurrence with Jack Schilz to the extent that such term implies that Mr. Schilz participated in the actual drafting; deny that said clause was "fraudulent" or "constituted a misrepresentation" or that it was inserted deliberately or otherwise for any purpose as alleged; deny having any knowledge or information sufficient to form a belief as to what plaintiffs believed, for any cause; deny that any clause was so worded as to make

anything appear other than what is stated in the agreement; deny that in said agreement it was promised or represented that the chattel mortgage would not be foreclosed and allege that said agreement expressly recited that the plaintiffs herein would remain liable to the Bank; deny that said clause or any other clause was inserted for any purpose of misleading the plaintiffs, or either of them, or that any clause or insertion thereof constitued any misrepresentation or that the defendants knew that such was the purpose; deny that there was any misrepresentation or that any misrepresentation influenced the plaintiffs to sign said agreement; deny that there was an fiduciary relationship; deny that there was any conspiracy, or that there was any "prelude" to any conspiracy; deny that the plaintiffs, for the reason alleged or any other reason, were deprived of any honest advice; deny having any knowledge or information sufficient to form a belief as to what advice they assumed they were getting from anyone; deny that there was any fraud as alleged or otherwise; deny having any knowledge or information sufficient to form a belief as to whether plaintiffs reposed any confidence as alleged; deny that any of said defendants possessed any "superiority or influence on said plaintiffs" for the reasons alleged or any other reasons to the extent that such allegation implies any basis for complaint herein; allege in this general respect upon information and belief that plaintiffs did not act in reliance on anything stated to them by these defendants, but acted on the basis of their own judgment and advice given them by their own advisers.

14. Deny each and every allegation contained in paragraph 14, except admit that Roger P. Paulsen represented the said Bank in the transactions herein involved; allege in this respect that the agreement which he drafted was fair and equitable to all of the parties.

Exhibit "B" to Church Affidavit

15. Deny each and every allegation contained in paragraph 15, admitting that Roger P. Paulsen represented the said Bank only, but denying in this respect any allegation or implication that the agreement was not fair or equitable or that the rights or interests of the plaintiffs were in any way violated; allege that there was no representation to the plaintiffs that Mr. Paulsen was representing the interests of anyone other than the Bank.

16. With respect to the allegations contained in paragraph 16, admit the check was not delivered to plaintiffs on May 11, 1965, but deny the allegations which suggest it was not paid because it was not at or in possession of the Bank, or that its location was unknown; deny having any knowledge or information sufficient to form a belief as to what plaintiffs relied upon; deny that the Bank or any of its officers or employees made any representation as alleged or otherwise; deny plaintiffs' legal argument that payment of the $2,000.00 on the date of signing was "a very material part of the transaction;" deny that the defendants Boorse or Schilz acted in any capacity except as employees of said Bank or that they contacted the plaintiffs by any ruse or on any pretense.

17. With respect to the allegations contained in paragraph 17, deny that the said agreement was not to take effect until after May 28, 1965; deny that Roland L. Holtz assumed active charge of the business on that date, alleging in this respect that on those dates when he was present on the premises prior to acquisition of title at the foreclosure sale, which presence was not continual, he was there with the permission of said Bank which as mortgagee had repossessed the equipment; deny that the defendants did not have permission from the plaintiffs to change locks,

alleging in this respect that such permission was within the terms of the chattel mortgage theretofore executed; with respect to the allegations that actions occurred on May 28, 1965, outside the presence of the plaintiffs, allege that these defendants were ready, willing and able to conduct all of their transaction in the presence of plaintiffs but that plaintiff Hugh Rooney left the premises when they arrived.

18 With respect to the allegations contained in paragraph 18, deny that foreclosing of the chattel mortgage was something that was deliberately contrived to the extent that such allegation implies any illegal, improper or actionable conduct, or that there was any conspiracy to commit any action, unlawful or otherwise, or that any conspiratorial or unlawful action occurred, as alleged or otherwise; deny that Roland L. Holtz was not to be given the right to possession until June 1, 1965; deny that at the time alleged there had been no breach, default or violation of the agreement, or that any of these defendants have so admitted; deny that the plaintiffs were promised or led to believe as alleged; deny that nothing occurred between May 11 and May 28 to give the Bank cause to foreclose; allege further in this respect that it was implicit in said agreement that the Holtzes would be able to take possession and carry on said business at the premises in question; allege upon information and belief that by reason of unpaid rent, and the position taken by plaintiffs, possession and carrying on of the business was prevented, and the Holtzes refused to proceed with payments; allege that the breaches of express and implicit provisions of the agreement, and anticipatory breaches, whether legally chargeable to plaintiffs or the Holtzes, or both, rendered the agreement impossible to perform and ineffective, and gave these defendants full right to proceed as they did.

Exhibit "B" to Church Affidavit

19. Admit the allegations contained in paragraph 19.

20. With respect to the allegations contained in paragraph 20, allege that said letter of June 9, 1965, as appears on its face, was sent in accordance with an understanding reached in a prior telephone conversation that the check would be sent for the purpose as stated; deny that defendants Boorse or Schilz advised Mr. Holtz that the check of May 28, 1965, was being forwarded; deny having any knowledge or information sufficient to form a belief as to what Mr. Holtz may have "admitted;" deny having any knowledge or information sufficient to form a belief as to what demands Mr. Holtz had made or as to when the plaintiffs turned over keys, as alleged; admit upon information and belief that Mr. Holtz stopped payment of the check, but deny having any knowledge or information sufficient to form a belief as to the time relationship of that act to the receipt of any keys; deny that there was any conspiracy, as alleged or otherwise, and deny that these defendants made any statements or performed any acts for any of the purposes alleged; deny that there was any conspiracy for the purpose of benefiting Mr. Holtz or any other purpose; deny having any knowledge or information sufficient to form a belief as to whether plaintiffs were prevented from paying the landlord; deny that these defendants conspired unlawfully or illegally or otherwise with any one for any purpose; deny that the chattel mortgage was foreclosed prematurely or without cause or reason; deny that these defendants did in any way hinder or prevent the plaintiffs with respect to the stopping payment of said $2,000.00 check; deny that defendant Roland Holtz was the only party in default, if his actions or non-action in fact constitute "default," but allege in this respect that even if he was, the Bank violated no duty or agree-

ment, as alleged or otherwise, as is more fully alleged in paragraph 18 above, incorporated herein by reference; deny that Roger Paulsen misrepresented the agreement in his said letter; deny that Roger Paulsen misled or deceived the plaintiffs in any way or that he was to represent their interests, alleging in this respect that it was made clear to the plaintiffs that he was representing the Bank.

21. Deny each and every allegation contained in paragraph 21.

22. Deny each and every allegation contained in paragraph 22.

23. With respect to the allegations contained in paragraph 23, deny each and every allegation thereof except admit that the Holtzes had not made the payments alleged, and that these defendants did not take any steps to enforce said contract against the defendants Holtz in the sense that they commenced any legal proceedings against them.

24. With respect to the allegations contained in paragraph 24, deny that there were any misrepresentations and deny that plaintiffs were caused to part with their business by reason of signing any agreement or by reason of any misrepresentations or conspiracy, or that they were thereby damaged or that they were damaged by these defendants for any cause whatsoever; deny that there was any fiduciary relationship, and deny having any knowledge or information sufficient to form a belief that the plaintiffs relied as alleged or otherwise; deny that plaintiffs were damaged as a result of any acts, misrepresentations or conduct by any of these defendants in any of the respects alleged in subparagraphs (a) to (h) inclusive, or in any other respect; with respect to the allegations contained in paragraph

24(a), deny that there was any fraud and deny each and every allegation thereof; with respect to subparagraph (b), deny that there was any fraud and deny that the plaintiffs lost any future profits by reason of any fraud; deny having any knowledge or information sufficient to form a belief as to the allegations in subparagraphs (c), (d) or (e); with respect to subparagraph (f), deny that there was any fraud or that the plaintiffs suffered as alleged by reason of any fraud; with respect to subparagraph (g), deny that the plaintiffs were deprived of any interest in the investment or that they were deprived of anything by the defendants; as to subparagraph (h), deny that plaintiffs suffered any damages in the amount alleged or any other amount, by reason of any act, breach, violation of duty, or any other cause attributable to these defendants; as to subparagraph (i), redeny the existence of any fraud; deny having any knowledge or information sufficient to form a belief that plaintiffs have been damaged from any cause and put them to their proof with respect to the existence, nature, extent and cause of their damages, if any.

WHEREFORE, these answering defendants demand judgment dismissing the plaintiffs' amended complaint herein as to them, together with their costs and disbursements of this action.

Exhibit "C" to Church Affidavit

CONSENT DECREE FILED IN 1967 STATE COURT ACTION AFTER A TRIAL ON THE MERITS IN SEPTEMBER OF 1969

(Formal Portions Omitted)

It Is Adjudged And Decreed:

1. The Defendants in this action did not engage in any fraudulent actions as against the Plaintiffs.

2. Plaintiffs' complaint in this case shall be and hereby is dismissed on its merits and without costs.

3. Plaintiffs shall not hereafter make or issue any public statements to the effect that any of the Defendants, their agents or employees engaged in any wrongful conduct as against the Plaintiffs.

Dated this 22nd day of September, 1969.

By The Court:
Arthur L. Luebke
Arthur L. Luebke, Circuit Judge

AFFIDAVIT OF HUGH A. ROONEY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

(Formal Portions Omitted)

Hugh Rooney, being first duly sworn, on oath deposes and says:

1. He is a factory workman and resides at rural route 3, Plymouth, Wisconsin.

2. The defendants in case 71-C-327 have strongly argued against the National Bank Act, aka Title 12 of the United States Code, and even against the very existence of such a law. If there were no such law, who could have possible control over the conduct and affairs of National Banks?

3. National Banks are 'licensed' by the federal government and very definite regulations as to their organizations and operations. The defendants have argued, in effect, that they are above any regulation.

4. When an average citizen pays his rather substantial income taxes there is a very definite difference between what are state and what are federal deductions. Like a citizen, a bank can have a state standing or a federal standing, and likewise for penalties. Yet the defendants argue being in a state court is all right, but that being in a federal court for a national bank is not all right.

5. Shortly after the beginning of this mess the plaintiffs called at the office of the then state bank commissioner and he quickly pointed out that his office had no authority over national banks, and that all national banks were under federal control.

6. The affiant believes the plaintiffs have a strong case for action.

AFFIDAVIT OF YOLA E. ROONEY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

(Formal Portions Omitted)

Yola Rooney, being duly sworn on oath deposes and says:

1. She is a housewife and an office worker, and makes this affidavit on her own basis of fact in this case.

2. All the points brought out in Mr. Church's and Mr. Schilz's affidavit relate strictly to the case already tried in a State Court, "res judicata", in which we were deprived of a jury verdict, because of agreements between the Judge and the lawyers. On this point, we were told by our lawyer that the Judge would over-rule any verdict the jury would decide. This was told to us just before

the case was to go to the jury for its decision. Eight days of evidence and testimony favoring the plaintiffs done for naught!

3. We are now relating some of these same points to Federal Banking laws and Regulations to which every National bank is subject. This is the main issue in this Federal Court case.

4. When Mr. Church was harassing us during the evening meeting on September 18th, I point-blank asked him whether the bank was regulated by Federal laws. This question he ignored, but repeated that we had no money, hence we had nothing to say about the settlement, repeating it several times without intervention by our lawyer or the Judge, and therefore we had nothing to say about the settlement.

5 In fact, nothing was ever presented to us in writing of a so-called settlement agreement, and neither did we sign anything or verbally agree to anything.

6. This affiant believes the Plaintiffs have definite and strong cause for action.

DECISION AND ORDER OF THE TRIAL COURT
(Formal Portions Omitted)

The plaintiffs in this action seek damages allegedly incurred as a result of the defendants' wrongful conduct in connection with the foreclosure of a mortgage held by the defendant bank on the plaintiffs' laundry and dry cleaning business and the subsequent sale of the property to the defendants Roland and Shirley Holtz. A motion for a change of venue accompanied the plaintiffs' complaint.

An answer to the complaint has been submitted by the bank and its two officers named as individual defendants; the bank later filed a motion for summary judgment.

However, when the Holtzes apparently failed to respond within 20 days after the service of the summons and complaint upon them, as required by Rule 12, Federal Rules of Civil Procedure, the plaintiffs moved for a default judgment as to these defendants.

In a letter to the plaintiffs with reference to their motion for a default judgment, this court stated that it would defer action on the motion pending the determination of whether "there is a proper basis for . . . [the court's] . . . jurisdiction in the instant case"—an issue which is raised by both the bank's answer and its motion for summary judgment. I have now concluded that this court does not have jurisdiction to hear the plaintiffs' claims.

The complaint does not contain the "short and plain statement of the grounds upon which the court's jurisdiction depends" required by Rule 8(a)(1), Federal Rules of Civil Procedure; however, the plaintiffs are pleading pro se, and I am mindful of the admonition of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice". This latter approach has been held to be applicable to the statement of jurisdiction of Rule 8(a)(1). Barnes v. Irving Trust Co., 290 F.Supp. 116, 117 (S.D. Tex. 1968).

It is apparent that jurisdiction in the case at bar cannot be predicated upon diversity of citizenship pursuant to 28 U.S.C. § 1332. The complaint contains no allegations as to the states of citizenship of the respective defendants; only the places of residence of the individual defendants are given and, as to the defendant bank, the complaint refers only to the location of its principal office. See Metropolis Theater Co. v. Barkhausen, 170 F.2d 481, 484 (7th Cir. 1948).

The fact that the bank is a national bank cannot save the plaintiffs' action. In Swift v. Fourth National Bank, 205 F. Supp. 563, 565 (M.D. Ga. 1962), the court stated:

> ". . . For jurisdictional purposes a national bank is deemed to be a citizen of the State in which it is located. Walker v. Bank of America, etc., 9 Cir., 268 F. 2d 16. In order for there to be diversity jurisdiction in this Court in the first instance, there must be diversity of citizenship between each Plaintiff and each Defendant in the case, and to sustain the diversity jurisdiction there must exist an actual controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side."

See also Kirk v. Kirk, 295 F. Supp. 1001, 1003 (Ore. 1968); Bachman v. First-Mechanics National Bank, 69 F. Supp. 739, 741 (N.J. 1947); but see Denicke v. Anglo California National Bank, 26 F. Supp. 240 (N.D. Cal. 1939).

The plaintiffs appear to rely on Title 12 of the United States Code, "Banks and Banking," for the proposition that this court has jurisdiction of their action. This position, nevertheless, cannot be sustained for, as noted in Bachman v. First-Mechanics National Bank, supra, at p. 741:

> ". . . the jurisdiction of the federal courts may not be invoked simply upon the ground that . . . [national banks] . . . were created by and exercised their powers under acts of Congress."

Furthermore, 12 U.S.C. § 94, which arguably confers jurisdiction to hear claims against national banks, consistently has been held to be merely a venue provision. See, e.g., Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963); Buffum v. Chase National Bank, 192 F.2d 58 (7th Cir. 1951), cert. denied 342 U.S. 944 (1952).

Finally, I am persuaded that the complaint presents no substantial federal question so as to give this court jurisdiction under 28 U.S.C. § 1331. The plaintiffs ostensibly complain only that the defendants intentionally mislead or defrauded them and that they have suffered economic and emotional injury. Notwithstanding the fact that the defendant bank was organized and is operated pursuant to federal statute, the plaintiffs' action does not appear to arise "under the Constitution, laws, or treaties of the United States."

Therefore, It Is Ordered, on the court's own motion, that the plaintiffs' action be and hereby is dismissed, with out prejudice.

Dated at Milwaukee, Wisconsin, this 14th day of September, 1971.

Myron F. Gordon
U. S. District Judge

Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, June 14, 1972

Before
Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. DON N. LARAMORE, *Senior Judge*•

No. 71-1846
HUGH ROONEY and YOLA ROONEY,
Plaintiffs-Appellants,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, KENNETH C. BOORSE, JACK SCHILZ, ROLAND HOLTZ, JR., and SHIRLEY HOLTZ,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 71-C-327 — Myron F. Gordon, Judge.

Argued April 24, 1972

ORDER

This is an appeal from an order of the district court dismissing the complaint for want of jurisdiction. The plain-

• Senior Judge Laramore of the United States Court of Claims is sitting by designation.

tiffs, pro se, brought action for damages against the defendants alleging wrongful conduct on behalf of the defendants in connection with the foreclosure of a mortgage held by the defendant-bank on the plaintiffs' laundry and dry cleaning business and the subsequent sale of the business to the defendants, Roland Holtz, Jr., and Shirley Holtz.

Upon consideration of the record and the briefs and oral argument, the district court's dismissal is affirmed.

It is patently clear from the record that the court did not have subject matter jurisdiction. The complaint does not allege diversity in citizenship; in fact, the facts alleged indicate that both the plaintiffs and defendants are citizens and residents of the state of Wsconsin. Moreover, the complaint does not set forth any federal question arising out of the federal statutes relating to national banks.

We adopt as our own, the decision of the district court in dismissing the complaint.